

In re) Fair Hearing No. 21,237
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 Appeal of)

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate physical abuse of a child. The issue is whether the Department has shown by a preponderance of the evidence that the petitioner physically abused a child within the meaning of the pertinent statutes.

The petitioner filed a request for fair hearing on December 6, 2007 contesting the Department's substantiation that she physically abused her older daughter on September 13, 2007. A telephone status conference occurred on January 7, 2008 and the case was set for hearing on January 30, 2008. The Department sought continuances due to witness unavailability¹; these continuances were granted.

¹ The Department's caseworker who investigated the case was ill.

the September 13, 2007 incident. The Family Court appointed an attorney for petitioner in the CHINS case who subsequently filed an Appearance before the Board on March 14, 2008. Pursuant to 33 V.S.A. § 4916b(c), the matter was stayed by the hearing officer pending resolution of the CHINS action.

The petitioner and her older child have a troubled relationship. The petitioner entered into a Stipulation in the CHINS action to access appropriate services for the family. Petitioner did stipulate to a physical altercation with her older child but did not stipulate to physical abuse of her older child. The Family Court did not make any findings of physical abuse arising from the September 13, 2007 incident.

Based on the availability of counsel and witnesses², the case was heard on December 18, 2008.

FINDINGS OF FACT

1. The petitioner is the mother of two minor children, KG and AG. KG was eleven years old at the time of the incident. AG was eight years old at that time. The petitioner's father and mother are GG and MG.

² The Department's caseworker continued to be ill and unavailable.

2. The case involves KG. The incident took place on Thursday, September 13, 2007, during the early evening hours (8:00 p.m. to 9:00 p.m.). The incident grew out of an argument between KG and the petitioner that started over who would prepare dinner. The argument escalated; the alleged physical harm was a bump on the back of KG's head. The relevant details will be spelled out below.

3. The parties stipulated to the following facts at hearing:

- a. The Department was notified of the incident on Monday, September 17, 2007.
- b. No photographs were taken of the bump.
- c. The police spoke with the petitioner and KG on the evening of September 13, 2007. They have no information regarding a bump.
- d. A Boys and Girl staff member was informed on September 17, 2007 of the alleged abuse. The staff member did not see a bump on September 17, 2007.
- e. The Department caseworker never saw a bump.

4. GG and MG lived around the corner from petitioner's apartment at that time. At the time of the incident, GG and MG lived with one of their children and with four grandchildren they had adopted after the death of their daughter. After the incident, they have cared for KG.

5. GG testified that petitioner telephoned him the evening of September 13, 2007 sounding upset and telling him that KG had run away. GG stayed home but MG went to the petitioner's apartment. GG testified that KG came to his house. He described KG as very upset, crying, and telling him that she did not want to go home. GG stated that KG told him that she had a fight with petitioner that started when petitioner refused to make Shepherd's Pie for KG. GG testified that KG told him that the fight escalated and that her mother hit her.

GG telephoned petitioner to let her know that KG was with him. Petitioner came to his house. KG did not want to return with the petitioner.

According to GG, the police were called. The police spoke to KG. GG testified that he was on his porch with petitioner when the police spoke to KG. He stated that the petitioner was upset. He testified that petitioner told him that when KG tried to leave home, the petitioner tried to stop her, and that KG pulled away and hit her head on the heater. GG testified that petitioner told him that KG tried to leave again and that when petitioner tried to stop KG from leaving, KG pulled away and hit her head on the door.

6. MG testified that petitioner telephoned on September 13, 2007 and told GG that KG left home through her bedroom window. MG went to petitioner's home and found her outside and upset. Petitioner received a telephone call from GG that KG was at his home. Petitioner left for her parents' home. MG was outside with AG and another granddaughter. After thirty minutes, MG had AG close up the house and returned to her home.

Upon returning home, MG stated she found GG, KG, and petitioner in the living room talking. They asked her to leave and she went outside where KG joined her a short time later. KG was upset and was saying she did not want to go home. MG asked petitioner if KG could stay with her and petitioner refused. KG tried to leave but GG stopped her. The petitioner called the police. The police came. KG agreed to return home with the petitioner.

MG testified that on September 13, 2007 she had no idea that KG had a bump on her head.

MG testified that the next day (Friday), she saw KG after school. Arrangements had been made for KG and AG to stay with their grandparents for the weekend. KG told her that she had a bump on her head. MG saw the bump and said it was the size of a walnut on the back of KG's head. MG

testified that the bump was large and she considered taking KG to the doctor but that KG seemed all right and that she did not think she could do that. MG did not call the police or the Department. MG attempted to take a picture but said the picture did not come out because of KG's dark hair.

MG testified that KG told her that she had an argument with petitioner and that the petitioner would not let her leave the house. According to MG, KG told her that she tried to get to the door but that petitioner blocked her and that KG fell forward. KG told her that she tried to leave but the petitioner pushed her and she hit her head on the back of the door. MG told KG to tell the school on Monday.

MG testified that she went with KG to the Boys and Girls Club on Monday, September 17, 2007, and told a staff member what happened. That staff member notified the Department.

MG acknowledges that the staff member did not see a bump on KG's head that Monday. MG acknowledges that the Department caseworker did not see a bump.

MG testified that she was present when the Department caseworker interviewed both KG and AG. The children were interviewed separately. According to MG, KG told the Department caseworker that the petitioner hit her and about being pushed and hitting her head. MG testified that AG said

she was in bed and came out at the end because of the noise and that AG said she did not see anything.

7. KG testified about the incident. KG found the process of testifying stressful and she had problems remembering everything that happened. In addition, KG testified to certain details that were not part of the information she gave investigators over the course of several interviews. KG testified that when she explains what happens, she may leave out details because it is just what she does. The following sets out the relevant evidence that she remembered at hearing, over one year after the incident.

KG stated that the incident started with an argument over dinner. The petitioner was working at her computer³; KG was in the doorway to the kitchen. KG testified that she did not want to make dinner for herself and her sister. KG asked the petitioner to cook Shepherd's Pie for her dinner but petitioner refused. KG explained that she felt put upon because she thought the petitioner was asking too much from her, too much responsibility with cooking everyday, washing dishes and other responsibilities that KG believed were the petitioner's responsibilities. KG stated she felt like she

³The computer desk is by the living room wall between the kitchen doorway and the door to KG's bedroom.

was the "mom" and did not want all the pressure put on her by petitioner to do these chores.

KG testified that she went into her bedroom and that the petitioner followed her into the bedroom. Their argument continued and escalated. Both were angry. KG began saying she did not want to live with petitioner anymore that she wanted to go to her grandparents.

KG testified that she went into the living room and kept saying she had enough and did not want to live there anymore. KG went towards the front door to try to leave. She testified that the petitioner pushed her and that she lost her balance and fell with the back of her head hitting the doorknob. KG said she was facing into the living room when she fell against the door knob. KG testified that her head hurt and that she said "ow". They argued whether petitioner pushed her. Petitioner did not feel KG's head.

KG testified that she went back to her bedroom and that she tried to get out the window. According to KG, the petitioner came into the bedroom, closed the bedroom door, and sat by the bedroom door so KG could not leave through the door. They continued arguing. KG then went through her bedroom window. KG testified that this was not the first time she had left home through her window. KG testified that

there had been other arguments with petitioner in which petitioner hit or pushed her.

KG testified that she hid outside until she saw the petitioner go in one direction then she left for her grandparents. She saw GG and told him that she had jumped out the window because the petitioner hit her. She was upset and crying when she spoke to GG. The petitioner came. GG spoke to petitioner. After MG arrived, KG went to MG and told her what happened. The police were called. She spoke to the police; she did not tell them about the bump on her head. She went home that evening with the petitioner.

KG testified that she had a bump on the back of her head where her ponytail is.

KG testified that the petitioner did not appear sick or nauseous when the argument occurred.

8. AG testified regarding the September 13, 2007 incident.⁴ AG was in bed when the incident started. Her bedroom is off the kitchen. AG testified that she got out of bed when she heard something fall. AG went into the kitchen and peeked through the doorway. AG testified that she does not know what the argument was about. AG said she saw KG

⁴ She was eight years old at the time of the incident and nine years old at hearing.

sitting on the floor before the front door facing into the room. AG would pull back when she thought someone would look so that she did not witness all the interactions between petitioner and KG. After KG left, AG went back to her room and pretended to be asleep until petitioner woke her.⁵

9. The petitioner testified that she did not feel well on September 13, 2007 because she had started new prescriptions that day and was feeling lightheaded and nauseous. Petitioner stated she was lying down when KG asked her to make Shepherd's Pie for dinner. Petitioner testified that she told KG that she was not feeling well and that KG should make a hot dog for herself.

Petitioner testified that KG kept asking for dinner and then started saying that she wanted to go to her grandparents. Petitioner characterized KG as screaming. Petitioner characterized her own voice as loud but not screaming or yelling. Petitioner testified that KG had been diagnosed with ADHD and OD.

Petitioner testified that KG went first to her bedroom where she opened the window and was going to jump out the

⁵ Both parties intimated that either the petitioner or KG tried to influence AG's testimony before the hearing. AG testified that KG spoke to her prior to the hearing about what happened. AG stated that in the past, the petitioner told her that the petitioner could go to jail.

window. Petitioner told her not to. KG then went to the front door and unlocked the front door. Petitioner testified that she told KG to calm down and lock the door. According to petitioner, KG slumped to the floor and started to bang the back of her head on the door while yelling about wanting Shepherd's Pie. Petitioner testified that she felt the back of KG's head to see if she was all right.

Petitioner testified that KG went back to her bedroom and sat on the floor in front of the door and leaned against the front of a night stand/dresser. KG continued her complaints, kicked her foot through the bedroom door⁶, and banged her head on the night stand. Petitioner testified that she felt KG's head and ankle. She felt no bumps.

Petitioner testified that AG came to KG's room and petitioner told AG to go to her room. At that point, KG closed her door and locked the door. While petitioner was finding a penny to unlock the door, KG jumped out her bedroom window and left.

Petitioner testified that she was hysterical and called her parents to tell them that KG was missing. She looked up

⁶ KG testified that she kneed the door rather than kicking it and that there was already a hole there. Petitioner took pictures of the hole in the door two to three days after the incident to have proof of what KG did. Petitioner was unable to answer why she took those pictures.

and down the street. Her mother, MG, came to her house. Petitioner testified that her father, GG, called her to let her know that KG was with him. Petitioner left MG with AG and went to her parent's home. MG came later with AG.

Petitioner testified that KG was still angry and yelling about dinner. Petitioner stated that KG tried to leave her grandparent's home but was stopped by MG and then by GG. Petitioner called the police who came and spoke to KG. The police and KG then told petitioner that KG would return home with her.

The next day, petitioner asked her parents to keep the children for a few days. The next Monday or Tuesday, the Department's caseworker came to see petitioner.

ORDER

The Department's decision to substantiate abuse is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

(3) "harm" can occur by:
(A) Physical injury or emotional maltreatment;
...

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

This case hinges on the events of September 13, 2007 when an argument over dinner escalated between petitioner and KG, her older daughter. The underlying conflict can be seen as a symptom of a troubled relationship between petitioner

and KG and a sign of family dysfunction. The testimony of all witnesses underscored the family dysfunction and its intergenerational nature. But, family dysfunction is not a basis to place a parent on the child abuse registry. The action in the CHINS case gives petitioner and her family access to services to address their underlying problems. We would encourage the petitioner to make full use of these services.

The sole issue before the Board is whether the Department has shown by a preponderance of evidence that petitioner's actions caused physical injury to KG. Physical injury includes temporary disfigurement; a bump can be considered temporary disfigurement. Petitioner and KG testified to their altercation. Only KG and her grandmother, MG, testified to the existence of a bump.

KG testified to the events on September 13, 2007 that when petitioner prevented her from leaving the house that petitioner pushed her, she lost her balance, and fell back with her head hitting the doorknob. KG, upset, went to her grandparents after going out her bedroom window. KG did not tell her grandfather, GG, about her head. According to GG, KG told him the petitioner hit her and she did not want to go home. KG did not tell the police that evening about her

head. The parties agree that the police have no information about a bump. If the police had information about a bump or alleged physical abuse, they are mandatory reporters and they would have called the Department during their intervention. MG testified that she did not know about the bump on September 13, 2007.

There is no mention of the bump on KG's head until September 14, 2007 when KG went to her grandparent's home after school. MG testified that she saw the bump on September 14, 2007. MG testified that she tried to document the bump in pictures but was unable to do so. However, MG did not call the police or the Department to report the bump and she decided not to seek medical attention. MG testified that she did not know that she could contact the Department on the weekends. However, MG has had prior contact with the Department regarding other grandchildren. It is also common knowledge that the Department is open for suspected child abuse complaints at all times.

The suspected abuse was reported Monday, September 17, 2007 by a staff member at the Boys and Girls Club. The staff member did not see a bump; the Department case worker did not see a bump.

A key element of supporting substantiation for physical abuse is an actual physical injury. In this case, the Department has to show by a preponderance of the evidence that there has been temporary disfigurement by other than accidental means. The Department has not done so because the evidence does not support a finding of temporary disfigurement, namely a bump on the head. Even if we were to assume for the sake of argument that petitioner pushed KG causing her to lose her balance and hit her head on the door, the case does not rise to physical abuse under the statute without the showing of temporary disfigurement.

Based on the foregoing, the Department's decision to substantiate is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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